

Staff Regulations that treatment, the object of which is to ensure that the Staff Regulations are applied to the officials and other servants of those two bodies and to identify the appointing authority for those employees, does not however extend to the application of the provisions of the Treaty, such as Article 24 of the Merger Treaty, relating to the adoption of Community regulations.

3. Discrimination consists of treating in an identical manner situations which are different or treating in a different manner situations which are identical. The situation of a serving official differs considerably from that of a pensioner, so that there is no discrimination in a case where the Community legislature accords to pensioners treatment which is not identical to that applied to serving officials.

In Case 828/79

ROBERT ADAM, an official of the Commission of the European Communities at the Ispra Joint Research Centre, Varese, Italy, represented by Cesare Ribolzi, of the Milan Bar, with an address for service in Luxembourg at the Chambers of Victor Biel of the Luxembourg Bar, 18a Rue des Glacis,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by Oreste Montalto, a member of its Legal Department, acting as Agent, with an address for service in Luxembourg, Jean Monnet Building, Kirchberg,

defendant,

APPLICATION in the terms set out in the pleadings,

THE COURT (First Chamber)

composed of: G. Bosco, President of Chamber, A. O'Keefe and T. Koopmans, Judges,

Advocate General: F. Capotorti
Registrar: J. A. Pompe, Deputy Registrar

gives the following

JUDGMENT

Facts and Issues

The facts of the case and the conclusions, submissions and arguments of the parties put forward during the written procedure may be summarized as follows:

I — Facts and procedure

1. Background provisions

This case should be seen against the background of the following provisions:

(a) In the version in force until 31 March 1979 Article 63 of the Staff Regulations of Officials provided that:

“An official’s remuneration shall be expressed in Belgian francs. It shall be paid in the currency of the country in which the official performs his duties. Remuneration paid in a currency other than Belgian francs shall be calculated on the basis of the par values accepted by the International Monetary Fund, and in force on 1 January 1965.”

In accordance with Article 17 of Annex VII to the Staff Regulations an official may have part of his emoluments transferred either regularly or on an exceptional basis, to a country other than that in which he performs his duties. Until 31 March 1979 Article 17 (4) provided that such transfers were to be made through the institution to which the official belonged “at the official rate

of exchange ruling on the date of the transfer”. The “official exchange rate” within the meaning of that provision was the last parity accepted by the International Monetary Fund, which had not been altered since 1 November 1969 (for example, BFR 13.66 = DM 1).

After the collapse in 1971 of the international system of fixed exchange rates, which is at the heart of those provisions, the parities came to reflect less and less the purchasing power of the currencies involved and their value on the international money market. Officials who had transfers made to countries the value of whose currency had increased in relation to the parities notified to the International Monetary Fund were thus able to realize gains on the exchange rate, as compared with transfers made in normal market conditions.

In accordance with the legal position existing prior to 1 April 1979 the weighting provided for in Article 64 of the Staff Regulations to reflect the living standards at the place where the official performed his duties had to be applied to the whole of the remuneration, including the part to be transferred to another country pursuant to Article 17 of Annex VII. This led to an increase in the weighting for officials assigned to countries such as Italy, the United Kingdom and Ireland, where the value of the currency had decreased in relation to the parities notified to the International Monetary Fund, and to a reduction in the weighting for officials assigned to countries whose currency had gained in value in relation to the parities of the Fund.

Pensioners were able to derive special advantages from these provisions. If they declared their domicile to be in a country whose currency had diminished in value, the weighting in respect of that country was applied to their pension in accordance with Article 82 (1) of the Staff Regulations. Article 45 of Annex VIII to the Staff Regulations gave them the opportunity of having their pensions paid in the strong currency of their country of origin or of that of the seat of the institution to which they belonged. This state of affairs was condemned by Mr Advocate General Mayras in his opinion in Case 28/74 *Gillet*, [1975] ECR 475.

In 1974 the Commission submitted proposals to the Council with a view to abolishing the anomalies in the rules governing the payment of remuneration and pensions brought about by the break-down in the international system of fixed exchange rates.

The proposal for a Council regulation amending the Staff Regulations of Officials, submitted to the Council by the Commission on 13 June 1974 (Official Journal 1974 C 88, p. 25) provided for an amended version of Article 17 (4) of Annex VII to the Staff Regulations:

“Transfers provided for in paragraphs (2) and (3) shall be made on the basis of the par values referred to in the last paragraph of Article 63 of the Staff Regulations; the amounts transferred shall be multiplied by a coefficient representing the difference between the weighting for the country in whose currency the transfer is made and the weighting for the country in which the official is employed.”

On 1 April 1977 the Commission submitted to the Council a proposal for a Council regulation introducing the European unit of account (EUA) into the Staff Regulations (Official Journal 1977 C 99, p. 5). That proposal was rejected by the Staff Regulations Committee, to which it had been referred. The Council obtained the opinion of the European Parliament and of the Court of Justice. By resolution of 7 July 1977 (Official Journal C 183, p. 55), the Parliament approved the proposal taking note of “the Commission’s assurance that its proposal will in no way affect the real value of the payments made to officials in the form of remuneration, pensions and allowances”. At the sitting, the Member of the Commission responsible for administration, Mr Tugendhat, stated: “The object of the Commission’s system is financial neutrality, and what we think that our system can achieve is an equality of purchasing power. What we want is that a Commission official of a given grade, whether he is working in Brussels or Luxembourg or London or any other part of the Community, should be able to buy exactly the same quantity of goods as his equal in another part of the Community ... The problem of transfers is also one that has preoccupied the Commission. There is a proposal for the amendment of the Staff Regulations now under consideration. In our view, that amendment must be adopted no later than the present draft regulation, and that, I think, covers another point about which there has been concern.”

The Council did not succeed in 1978 in adopting the regulation proposed by the Commission on 6 October 1976 (Official Journal C 271, p. 5) “on the procedure for applying the European unit of account (EUA) to the legal acts adopted by the institutions of the European

Communities". The Commission therefore set to work to bring up to date, in the light of the situation thereby created, the exchange rates in respect of remuneration for officials which was envisaged by the proposal of 1 April 1977. In an annex to its report in 1978 on the yearly survey of the level of remuneration (Doc. COM. (78) 6735 final of 29 November 1978), the Commission sent the following communication to the Council on which neither the Parliament, the Court of Justice nor the Staff Regulations Committee was consulted:

"... The first two paragraphs of Article 63 are replaced by the following:

'Officials' remuneration shall be expressed in Belgian francs. It shall be paid in the currency of the country in which the official performs his duties. Remuneration paid in a currency other than Belgian francs shall be calculated on the basis of the exchange rates used for the implementation of the general budget of the European Communities on ...

The Commission urges the Council to adopt the aforementioned article before the end of the year as well as Article 17 of Annex VII which is the result of the Council's studies relating to the amendment of the Staff Regulations ...

The ... regulation should come into effect on 1 January 1979, ... and should apply from 1 April 1979. However, for pensioners in receipt of allowances whose net financial benefits will be less than those under the existing arrangements, the regulations will apply only from 1 October 1979 ..."

(b) On 21 December 1978, the Council adopted Regulation No 3085/78 (Official Journal L 369, p. 6), amending, with particular reference to the monetary parities to be used, Regulation No 259/68 laying down the Staff Regulations of Officials of the European Communities and the Conditions of Employment of Other Servants of the Communities, Regulation No 2530/72 and Regulation No 1543/73 concerning certain special measures. The regulation embodies the wording of the communication from the Commission of 29 November 1978 and also the formula contained in the proposal of 1 April 1977 concerning the weighting to be applied to amounts transferred. The Council added however: "From that date the difference between the net amounts resulting from the implementation of the regulation and those received in September 1979 shall be reduced by $\frac{1}{10}$ per month." The regulation fixes 1 July 1978 as the relevant date for calculating remuneration paid in a currency other than Belgian francs on the basis of the exchange rates used for the implementation of the general budget of the Communities and goes on to state that that date shall be changed at the time of the annual review of remuneration.

(c) Hand in hand with the bringing up to date of the exchange rates, the Council adopted Regulation No 3086/78 on 21 December 1978 (Official Journal L 369, p. 8) adjusting the weightings applicable to the remuneration and pensions of Officials and Other Servants of the European Communities following the amendment of the provisions of the Staff Regulations concerning the monetary parities to be used in implementing the Staff Regulations, which amended the value of the

weighting according to the various places of employment, in such a way that every official or temporary employee employed elsewhere than in Belgium or Luxembourg received the same level of remuneration in April 1979 as his remuneration for the preceding month. Since the point of departure — the amount of the remuneration in Belgian francs — remained in effect *ex hypothesi* the same, as regards payment transactions, and the end of the procedure — the amount of the payment in national currency — ought itself normally to remain the same, therefore as soon as one of the parameters of payment, for example the exchange rate, was altered it was necessary to adjust the second parameter (weighting) in such a way as to ensure the neutrality of the transaction.

2. Facts and procedure

The applicant, an official in Grade B 2, Step 8, receiving total remuneration of LIT 2 455 877 (pay statements for March and April 1979), whose monthly transfers were BFR 32 834, DM 2 366 and BFR 2 660, found that the amount necessary to effect those transfers was increased by LIT 497 259. That sum corresponds to 20.24% of his total remuneration for April.

By a complaint set out in the same terms as a large number of other complaints lodged at the same time, registered on 21 June 1979, the applicant objected to the increased cost, starting in April 1979, of his transfers carried out through the Commission, which entailed a decrease in the remaining remuneration actually paid to him.

On 28 September 1979 the Commission sent a note through the internal mail, which was described as a telex message from the Director of Personnel of the

Commission dated 27 August 1979 as constituting an individual express decision on the complaints.

This application, dated 10 December 1979, was received at the Court on 21 December 1979, at the same time as the other parallel applications (Cases 829 to 1204/79, 1249 and 1250/79).

It was subsequently decided that this case should become a test case.

On hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court (First Chamber) decided to open the oral procedure without any preparatory inquiry.

II — Conclusions of the parties

The *applicant* claims that the Court should:

1. Annul the implied decision rejecting the complaint submitted in due time by the applicant and, in the alternative, the so-called express decision of 28 September 1979 in so far as they are vitiated by breach of the general principles of law, breaches of rules of law relating to the application of the Treaty, misuse of power and infringement of essential procedural requirements which invalidate both them and Regulations Nos 3085 and 3086/78 upon which they are based;
2. Declare unlawful the decrease in the part of the remuneration paid to the applicant in Italian lire, *ceteris paribus*, with effect from April 1979 for the reasons and on the grounds set forth in the application;
3. Declare, in the exercise of the Court's unlimited jurisdiction in that regard,

that the applicant is entitled to have the parts of his salary which are paid in Italian lire and in foreign currency maintained unchanged, consolidated at the March 1979 level until the effects of the change are absorbed by increases in remuneration — other than those payable in respect of variations in purchasing power — and is also entitled to rectification of the monthly payments made in the intervening period;

4. Order the defendant to pay the costs of the proceedings.

The *Commission* claims that the Court should:

Dismiss the application as unfounded;

Order the applicant to pay the costs.

III — Submissions and arguments of the parties

The applicant's first submission is based on breach of the principle of the protection of legitimate expectation in so far as the action taken has resulted in a decrease of the part of his remuneration paid in lire. The fact that the defendant itself admits that "the effect of the reorganization decided upon by the Council has in several cases been to increase the cost of transfers" belies the alleged "neutral" character of the transaction. It is not, as the Commission maintains, a case of *lucrum cessans* — the advantageous exchange rate for transfers was previously offset by the disadvantageous conversion into lire of the major part of the remuneration — but of *damnum emergens*.

The principle of non-discrimination is also breached. In fact, there are no transitional provisions applicable to the special category of officials who make transfers authorized by the Commission, whereas Regulation No 3085/78 contains such provisions with regard to those entitled to pensions. The necessary pre-condition for application of the principle of non-discrimination, namely the similarity of the situation at the time when such similarity is called in aid, is certainly satisfied in this case.

The applicant contests the lawfulness of the weighting introduced by Regulation No 3086/78 and the methods by which it was calculated. In fact, instead of the rule laid down in the first paragraph of Article 64 of the Staff Regulations being followed, the weightings were fixed so as to obtain, by a simultaneous application of the new exchange rates, salaries nominally equal to those paid in March 1979. The applicant claims that the infringement of that provision also amounts to a case of misuse of power since the Commission used the weighting for a purpose different from that laid down in the rules for that institution.

There has also been an infringement of essential procedural requirements since the change made to the proposed rules was not submitted in advance to the bodies set up under the Staff Regulations which must be consulted whenever measures are to be adopted which involve amendment of the Staff Regulations and which affect personnel management. The fact that the amendment in question was unanimously approved by the Council makes no difference. Moreover, Regulations Nos 3085 and 3086/78 are characterized by the inadequacy of the statement of the grounds on which they are based, which is limited to an affirmation of the need "to amend the provisions of the Staff

Regulations concerning the monetary parities used in application of the Staff Regulations and the detailed arrangements for the transfer of part of an official's emoluments to a country other than the country of employment of the person concerned".

As regards the alleged individual decision of 28 September 1979, it was notified "*in incertam personam*"; on an unspecified date. If the Court were to regard the relevant note as constituting an individual decision rejecting a request, it would inevitably have to be regarded as invalid by reason of infringement of essential procedural requirements. Furthermore, the stated reasons for the note in question contain an inexact statement of the facts regarding the alleged "neutrality" of the new exchange rates and the alleged unlawfulness of the exchange gains which accrued to certain officials under the earlier system. The case-law of the Court regarding the statement of the grounds on which decisions are based is quite explicit with regard to the requirement of clarity and completeness.

In its defence, the *Commission* points out that before the rule of protection of legitimate expectation may be relied upon, the authority concerned must have entered into commitments, that is to say "assumed obligations which it has bound itself to observe" (cf. Case 81/72 *Commission v Council* [1973] ECR 575). At no time has the defendant given the applicant an undertaking not to change the conditions of the Staff Regulations governing the employment relationship, in particular as far as the detailed arrangements for transfers are concerned. Moreover, it could not have validly given such an undertaking, in view of the fact that the contract of service and the rights and duties flowing

therefrom are governed by regulations. It is thus pointless for the applicant to maintain that the draftsmen of the Staff Regulations intended to introduce, by means of Article 17 of Annex VII, an "exchange guarantee" for the benefit of officials so as to safeguard them for all time from the effects of such fluctuations as might occur in the monetary parities and from the increased cost to which such fluctuations might give rise with regard to the financial obligations assumed by the staff in any particular Member State (cf. Opinion of Mr Advocate General Dutheillet de Lamothe in Joined Cases 63 to 75/70 *Bode* [1971] ECR 549, p. 557). The true reason for the transfer facilities regulated by that provision must be seen in the light of the historical context of the preparatory work on the texts of the Staff Regulations in 1961 when exchange control was often very strict and yet officials of different nationalities had to be freely allowed to honour their financial commitments in their countries of origin or in the countries where their families resided.

Subsequently, as a result of the new situation in which currencies float, it became in practice easy to take improper advantage of the *ratio legis* of Article 17 of Annex VII, since transfers of a part of officials' remuneration, although within the limits laid down in a "code of good conduct" established in June 1974, became a means of obtaining "strong currencies" at a rate much lower than the market rate, with consequent adverse effects on the Community budget.

The staff could not have been under any misapprehension as to the practical repercussions on transfers of the updating of exchange rates. An administrative circular distributed in May 1978 drew attention to "the disappearance of certain advantages now

available" in that area and indicated that the transfers would thereafter be made on the basis of the value of the European unit of account, giving an example of the results of the calculations. It was therefore out of the question to conclude that the operation would be absolutely neutral from the financial point of view, since the object was to eliminate unjustified advantages in the future. For a long time therefore staff representatives had been well acquainted with the Commission's intentions and even expressed their agreement regarding that "rationalizing" operation by imposing only one condition with regard thereto, namely that the Italian weighting should be re-examined so that it more accurately reflected the true state of affairs. Thus on 21 December 1978 the Council adopted Regulation No 3087/78 adjusting the weighting applicable to the remuneration and pension of Officials and Other Servants of the European Communities employed or having a home in Italy (Official Journal 1978 L 369, p. 10), granting an increase of 6.4 % to the Italian weighting with effect from 1 January 1978. Therefore, there was no longer any justification for the "offsetting" claimed of the "undervalued" weighting by means of the transfers. During the period from 1 January 1978 to 31 March 1979 officials even enjoyed the advantages of the old transfer system whilst at the same time they also had the benefit of a "corrected" weighting. It is therefore totally improper to claim that the assurances given by the defendant regarding the neutrality of the proposed updating operation with regard to remuneration referred also to transfers.

As regards the alleged discrimination between officials and pensioners, the

Commission contends that in fact the only legal principle applicable is that there must be no arbitrary discrimination, that is to say discrimination for which there are no objective grounds, and that the principle of equality is not applicable. The situation of pensioners, taken into account in Article 4 of Regulation No 3085/78, is not the same as or even comparable with that of officials who arrange for transfers to be made. In the case of pensioners the new system has entailed a sharp reduction, from one month to the next, which may be as much as half the amount in lire previously obtained from resale of the amount paid in Belgian francs or German marks in respect of the pension. On the other hand, in the case of serving officials, the increase in the amount of funds required for the transfers is nowhere near that proportion since at the most only 35 % of remuneration may be transferred. In extreme cases, those of transfers to Germany of 35 % of the remuneration for March of an official employed in Italy, the increased cost of the transfer might at the most be around 25 % of the total remuneration for April.

Having regard to the case-law of the Court, the Commission can find no grounds to conclude that the amendments made by the Council to Article 63 of the Staff Regulations and Article 17 of Annex VII thereto might constitute a misuse of its powers. Being entitled to adapt the Staff Regulations to "economic realities" (Case 28/74 [1975] ECR 463) the Council, on the contrary,

attained the objective which it pursued (updating of the rates) without misusing its powers.

The Italian weighting was calculated mathematically. If in March an official employed in Italy received net remuneration of 1 000 000 lire by application of the Italian weighting which took into account both the cost of living and the monetary parity applied, identical remuneration should therefore have been paid to him in April. It is indeed unthinkable that in one month the cost of living might vary sufficiently to justify an increase in remuneration. Since one of the factors influencing the weighting, namely monetary parities, had been brought into line with the true situation, it became necessary to alter the weighting so as to obtain a result which did not alter the amount of the April remuneration. Certainly, the transfers cost more, but the rationalization of the system was one of the specific objects pursued.

As regards the allegation of insufficient consultation, the Commission observes that the applicant's view would be well founded if, after a first proposal from the Commission was put forward and before the Council adopted any decision on it, a quite new proposal was submitted, that is to say one concerning other matters or making substantial amendments (cf. *a contrario* Case 41/69 *ACF Chemiefarma* [1970] ECR 661). In the same way, the consultation procedure provided for in Article 10 of the Staff Regulations does

not have to be repeated every time a minor alteration is made. In this case, by a communication of 30 November 1978 the Commission informed the Council of its desire that Article 1 of the initial proposal of April 1977 be re-worded. A comparison with the last-mentioned text shows clearly that the new provisions do not amount to a substantial amendment. The nub of the amendment to the Staff Regulations is merely the abandonment of the old IMF parities and replacement of them by updated parities whereby every official is still entitled to the same total remuneration in the currency of the place of his employment. That would have been the result obtained if the rates had been updated by application of the European unit of account. That is in fact the result obtained by the updating of the rates under the procedure finally adopted. In the case of transfers, updating on the basis of the European unit of account of the exchange rates to be applied to such transactions involved an increase in the cost thereof to an extent equivalent to that resulting from the application of Regulation No 3085/78. In fact, the exchange rates used for implementation of the general budget of the Communities as at 1 July 1978 were strictly related to the value of the currencies considered (Belgian franc on the one hand, other currencies on the other) with respect to the European unit of account on the same date.

In his reply, the *applicant* emphasizes that the Commission deliberately omitted to mention an essential fact, namely that whilst in the past transfers outside Italy could be made at a favourable exchange rate, the value of the remaining remuneration was reduced by the unfavourable impact of that same exchange rate. The Commission was not entitled to

claim that it had remedied that situation by means of the weighting. In fact, the increase of the weighting took place some considerable time after the increase in the cost of living; it did not take into account the changes in the cost of living peculiar to the province of Varese and did not even offset the loss of purchasing power of the currency within the State or loss of value of the Italian currency with respect to the currencies of the other Member States, as indicated by the difference between the purchasing-power parity and the monetary parity. The applicant maintains that in the past the Commission — at the expense of criticism, on legal grounds, from the financial controller but with the clear intention of offering some compensation to the staff — extended the possibilities of making transfers abroad.

The applicant indicates that, even in 1974, the Parliament did not give a favourable opinion on the Commission's initial proposal. That opinion was given only after repeated initiatives in 1977 and in particular after the Commission had given formal guarantees that the position regarding remuneration would be left untouched. Since the Parliament explicitly mentions transfers in the second recital in the preamble to its resolution, it is clear that the guarantees that the rights of the staff would be left untouched related also to those transfers. By adhering to its position, the Commission is guilty of very serious misconduct consisting of misleading the Parliament, which had assumed the role of intermediary regarding the guarantees given to officials.

The applicant is of the opinion that, for a number of reasons, serving officials

should have been accorded treatment analogous to that accorded to pensioners. In the first place, a reduction in the emoluments of pensioners involves the loss of certain specific, and without doubt favourable, possibilities whereas the reduction suffered by serving officials does not offer any corresponding extra advantage or benefit from the combined effect of any provisions of the Staff Regulations. In the second place, whilst a pensioner may establish his residence wherever he thinks most appropriate or beneficial to his own interests, a serving official's residence is linked to his place of employment and involves the need for transfers of funds to another State or States. In the third place, the refusal to draw a comparison between serving officials and retired officials goes too far; both cases are concerned with relationships and benefits which have the same legal basis corresponding to situations which display at least some affinities. The applicant notes that the Commission considered transitional provisions to be necessary also for its own officials, who suffered not insignificant decreases of salary following the elimination of certain distortions of remuneration, an operation known as the "nettoyage de la grille [readjustment of salary scales]" (cf. Council Regulation No 160/80).

The applicant reiterates the objection that essential procedural requirements have been infringed, indicating that the 1977 proposal sought *inter alia* to introduce the European unit of account into the Staff Regulations and to express in those units all the amounts until then expressed in Belgian francs, whilst Regulation No 3085/78 maintains the Belgian franc as the monetary parameter and only the parities to be used pursuant to the Staff Regulations are changed together with the detailed arrangements

for any partial transfer of emoluments outside the State of the place of employment. These differences of principle between the two instruments seem even more substantial if the following is borne in mind: that the proposal related to a measure which was intended to conform to the Community monetary policy and to apply in practice the unit of account which was created on 18 December 1975 in all the areas of activity governed by the Treaties; that those fundamental objectives were not attained by Regulation No 3085/78 (the important sector of the common agricultural policy in particular being excluded therefrom); that in view of the fact that the unit of account was definitive and subject to changes in case of need, the regulation provides that the power of review is to be exercised only when the annual examination of remuneration takes place, even though the interests of officials may in the meantime have been seriously harmed; that whilst the 1977 proposal does not provide for the adoption of supplementary provisions regarding transfers, Regulation No 3085/78 refers to rules established on the basis of common agreement by the institutions of the Communities after consultation of the Staff Regulations Committee, since those rules lay down restrictive and inflexible limits on transfers, they make Regulation No 3085/78 much more important than the 1977 proposal; that numerous "innovations", of which there is no trace in the 1977 proposal, were incorporated in Regulation No 3085/78, such as transfers effected by officials serving outside the territory of the Community and the introduction of other currencies, transfers in exceptional circumstances, transitional provisions in favour of pensioners, whilst rules of no lesser necessity which were envisaged in the proposal were not included in the regulation, such as calculation for the reimbursement of expenses still carried out on the basis of quarterly exchange

rates in pursuance of a decision of the Commission of 4 November 1974 and of the Director General for Administration of 21 January 1976.

In its rejoinder, the *Commission* admits that the weighting has been used for a purpose other than that for which it was designed, but asserts that this was done solely to protect officials from the adverse effects of an out of date exchange rate. The Council regulations contested in these proceedings made it possible to bring order into the system, on the one hand by restoring to the weighting its essential function of making adjustments for the cost of living and, on the other hand, by applying exchange rates which are fully in line with reality. If, before the adoption of Regulation No 3087/78, advantages in respect of transfers had been desired by the Commission to offset an inappropriate weighting, there would be no grounds for granting such compensation after the weighting was increased by 6,4% because there would no longer be anything to compensate.

The Commission replies that the opinion given by the Parliament on 15 October 1974 is favourable to amendment of the weighting applicable to transfers and that *inter alia* it advocates the use for the amounts to be transferred of a coefficient based on the ratio between

the weighting fixed for the country in whose currency the transfer was made and the weighting applicable to the remuneration of the officials. That opinion was not retracted in 1977 and the definitive text adopted by the Council in 1978 incorporated the amendment proposed by the Parliament in May 1974 in its precise terms. The Members of Parliament were perfectly aware that the proposal to adjust the rates between the different "values" considered also extended to "transfers of funds" and involved an increase in the cost of transactions where the country of destination was one with a strong currency. The "financial neutrality" which was expected to be the result of the proposed system referred to the total remuneration, disregarding any transfers, so that the total remuneration remained at exactly the same level as before adjustment of the rates. The Parliament cannot have been mistaken on this point since immediately after referring to the "financial neutrality" Mr Tugendhat, the Member of the Commission who was concerned, drew the attention of the Members of the Parliament to the specific problem of transfers, which, he said, "is also one that has preoccupied the Commission". The report of the Committee on Budget (Document 218/77) referred to in the opinion of 7 July 1977 was moreover particularly explicit on that point.

As regards the alleged breach of the principle of equality between officials and pensioners, the Commission adds that whilst it may be true that pensioners had enjoyed treatment which was certainly favourable, it is not true that the system of transfers gave no advantage to officials. If there was no

loss of any advantage, why did the latter demand that the previous system, which gave them "no advantage" should be applied to them? The fact that pensioners have the opportunity to establish their residence where they wish has no legal effect other than to show that the positions under the Staff Regulations are different and are not comparable. The Commission took into account the fact that serving officials may be obliged to make transfers to other Member States, since it authorizes such transfers and, moreover, does so on favourable terms — the ratio between the two weightings. What may no longer be authorized is the execution of such transfers in a manner allowing considerable profits to be made in certain cases. Although there is discrimination, those discriminated against are not officials employed in Italy but those employed in Belgium! As regards the absence of transitional measures, it is sufficient to point out that the essential feature of transitional provisions is their "voluntary" character.

The Commission observes that both under the system rationalized by the direct introduction of the European unit of account into the Staff Regulations and under a system which maintained the Belgian franc as the monetary basis, the applicant would have paid the same sum in Belgian francs to make an identical transfer. The monetary parities have a direct effect on purchasing power and the repercussions of an unforeseen change in those parities are certainly neutralized by an adjustment of the weighting which, pursuant to Article 65 (2) of the Staff Regulations, may be modified at any time. The other numerous "innovations" are, in the opinion of the Commission, measures of

a minor and supplementary nature. The restrictive limit of 35%, the maximum percentage of remuneration which may be transferred, is not an innovation since that percentage was already the maximum provided for in the "Code of Good Conduct" in force in 1974. Moreover, the Commission points out that Regulation No 3085/78 was adopted by the Council unanimously and that that fact alone is sufficient to remove the obligation to consult the

Parliament again (Article 149 of the EEC Treaty).

IV — Oral procedure

The parties presented oral argument at the sitting on 19 and 20 February 1981.

The Advocate General delivered his opinion at the sitting on 14 May 1981.

Decision

- 1 By an application lodged at the Court Registry on 21 December 1979, Robert Adam, an official of the Commission employed at the Ispra Joint Research Centre, Italy, brought an action pursuant to Article 91 of the Staff Regulations of Officials (hereinafter referred to as "the Staff Regulations") for annulment of the Commission's decision fixing the applicant's remuneration for April 1979 and of the rejection of the complaint lodged by him against that decision.

- 2 Articles 63 and 64 of the Staff Regulations in the version in force until the end of 1978 provided: "An official's remuneration shall be expressed in Belgian francs. It shall be paid in the currency of the country in which the official performs his duties. Remuneration paid in a currency other than Belgian francs shall be calculated on the basis of the par values accepted by the International Monetary Fund . . . on 1 January 1965. An official's remuneration expressed in Belgian francs shall . . . be weighted at a rate above, below or equal to 100%, depending on living conditions in the various places of employment. . . . The weighting applicable to the remuneration of officials employed at the provisional seats of the Communities shall be equal to 100 % as at 1 January 1962".

- 3 In accordance with Article 17 of Annex VII to the Staff Regulations an official may have part of his emoluments transferred either regularly or on an exceptional basis to a country other than that in which he performs his duties. Until 31 March 1979 Article 17 (4) provided that such transfers were to be made through the institution which he serves "at the official exchange rate ruling on the date of transfer". The "official exchange rate" within the meaning of that provision was the last parity accepted by the International Monetary Fund, which had not been altered since 1 November 1969 (for example, BFR 13.66 = DM 1).

- 4 On 21 December 1978 the Council adopted Regulation (Euratom, ECSC, EEC) No 3085/78 (Official Journal 1978, L 369, p. 6). Article 1 of that regulation provides that Article 63 of the Staff Regulations is replaced by the following wording:

"Officials' remuneration shall be expressed in Belgian francs. It shall be paid in the currency of the country in which the official performs his duties.

Remuneration paid in a currency other than Belgian francs shall be calculated on the basis of the exchange rates used for the implementation of the general budget of the European Communities on 1 July 1978.

This date shall be changed, at the time of the annual review of remuneration provided for in Article 65, by the Council acting by a qualified majority upon a proposal from the Commission as provided in the first indent of the second subparagraph of Articles 148 (2) of the EEC Treaty and of 118 (2) of the Euratom Treaty.

Without prejudice to the application of Articles 64 and 65, the weightings fixed pursuant to these Articles shall, whenever the above date is changed, be adjusted by the Council, which, acting in accordance with the procedure mentioned in the third paragraph, shall correct the effect of the variation in the Belgian franc with respect to the rates referred to in the second paragraph."

- 5 Article 2 of the regulation provides:

"Article 17 of Annex VII shall be replaced by the following:

‘Article 17

1. Payment shall be made to each official at the place and in the currency of the country where he carries out his duties.

2. Under the terms laid down in rules drawn up by common agreement by the institutions of the Communities, after consultation of the Staff Regulations Committee, an official may:

(a) through the institution which he serves, regularly have part of his emoluments transferred up to a maximum amount equal to his expatriation or foreign residence allowance:

either in the currency of the Member State of which he is a national,

or in the currency of the Member State in which either his own domicile or the place of residence of a dependent relative is located,

or in the currency of his previous country of employment or of the country in which his institution has its seat, provided that the official in question has been assigned to a post outside the territory of the European Communities;

(b) have regular transfers made in excess of the maximum stated at the beginning of paragraph (a) provided that they are intended to cover expenditure arising in particular out of commitments proved to have been regularly undertaken by the official outside the country where the institution has its seat or outside the country where he carries out his duties;

(c) be authorized, in very exceptional circumstances and for good reasons supported by evidence, to have transferred, apart *from the aforementioned regular transfers, sums which he may wish to have available in the currencies referred to in paragraph (a).

3. The transfers provided for in paragraph (2) shall be made at the exchange rate specified in the second paragraph of Article 63 of the Staff Regulations; the amounts transferred shall be multiplied by a coefficient representing the difference between the weighting for the country [in whose currency the transfer is made and the weighting for the country] in which the official is employed.’ ”

⁶ Article 4 of the regulation provides that it is to enter into force on 1 January 1979 and is to apply from 1 April 1979.

- 7 On 21 December 1978 the Council also adopted Regulation (Euratom, ECSC, EEC) No 3086/78 adjusting the weightings applicable to the remuneration and pensions of Officials and Other Servants of the European Communities following the amendment of the provisions of the Staff Regulations. Article 1 (1) of the regulation fixes *inter alia* the weighting applicable to remuneration as 74.3 for Italy and 98.7 for the Federal Republic of Germany.
- 8 Under Article 17 of Annex VII to the Staff Regulations the applicant had certain amounts transferred regularly to Belgium and the Federal Republic of Germany. The exchange value in Italian lire of the sums thus regularly transferred amounted in March 1979 to LIT 847 675.
- 9 As from 1 April 1979 the cost of those transfers in Italian lire at the exchange rate calculated in accordance with the newly worded Article 17 (3) of Annex VII to the Staff Regulations, mentioned above, amounted to LIT 1 334 934.
- 10 On 21 June 1979 the applicant filed a complaint under Article 90 (2) of the Staff Regulations regarding the increase in the cost of transfers made by him as from April 1979. On 28 September 1979 the Commission replied by a letter which, according to the applicant, was addressed *in incertam personam*, to the effect that, on the one hand, it could not without exceeding its authority fail to apply Council regulations which had properly entered into force and, on the other hand, that in substance it approved the amendments made to the Staff Regulations.
- 11 The applicant therefore brought this action asking the Court (1) to annul the implied decision rejecting his complaint, and, in the alternative, the "so-called" express decision of 28 September 1979; (2) to declare unlawful the decrease in the part of the remuneration paid to the applicant in Italian lire, *ceteris paribus*, with effect from April 1979; (3) to declare that the applicant is entitled to have the parts of his salary which are paid in Italian lire and in foreign currency maintained unchanged, consolidated at the March 1979 level, until the effects of the change are absorbed by increases in re-

muneration — other than those payable in respect of variations in purchasing power — and is also entitled to rectification of the monthly payments made in the intervening period.

- 12 The applicant relies in the first place on certain grounds based on an infringement of essential procedural requirements. He maintains that the contested regulations were adopted without prior consultation with the institutions concerned referred to in Article 24 of the Treaty of 8 April 1965 establishing a single Council and a single Commission of the European Communities (hereinafter referred to as “the Merger Treaty”). The Economic and Social Committee was not consulted, nor was the Court of Auditors which, according to the applicant, are the institutions concerned within the meaning of that article. Moreover, consultation with the European Parliament took place on the basis of a proposal from the Commission which was considerably different from the text of the regulation adopted by the Council.

- 13 The applicant then puts forward arguments concerning the content and effects of the regulations. He criticizes the application of the regulations, maintaining that implementation of the new wording of Article 17 of Annex VII to the Staff Regulations breaches the principle of protection of vested rights; that since the change in the conditions laid down in the Staff Regulations involved a considerable reduction of the net remuneration received by officials it undermined the fundamental conditions which were of such a kind as to influence the applicant’s decision to agree to be bound by the Staff Regulations; and that the application of the text was in breach of formal commitments entered into by the Commission to the effect that it would ensure that the measures proposed by it would be strictly neutral and would not affect the real value of payments made to officials in respect of their remuneration, pensions and allowances. The manner in which the weighting was calculated in Regulation No 3086/78, namely by the use of an accounting device intended to leave matters as they were, except as regards the adverse impact on transfers, constitutes a case of misuse of powers. Moreover, the statement of the reasons on which the regulations in question were based did not satisfy the requirements of Article 190 of the Treaty.

- 14 The applicant also complains of the discrimination which, according to him, is inherent in the transitional provisions applicable to pensions in view of the

fact that no transitional provisions are applicable to the transfers made by the applicant in accordance with Article 17 of Annex VII to the Staff Regulations. The Commission should, in the discharge of its duty to assist officials, of which Article 24 of the Staff Regulations constitutes an illustration, have laid down transitional procedures for compensation, by way of an implementing measure, which should have been coterminous with the legal and contractual obligations of the officials.

Infringement of essential procedural requirements

- 15 It should be noted that, when changes are made to the Staff Regulations of Officials and the Conditions of Employment of Other Servants, Community law requires that the Parliament and the Court of Justice be consulted and that the opinion of the Staff Regulations Committee be obtained. Article 24 of the Merger Treaty provides that "The Council shall, acting by a qualified majority on a proposal from the Commission and after consulting the other institutions concerned, lay down the Staff Regulations of Officials of the European Communities and the Conditions of Employment of Other Servants of those Communities". Article 10 of the Staff Regulations provides that the Staff Regulations Committee (consisting of representatives of the Staff Committees) is to be consulted by the Commission on any proposal for the revision of the Staff Regulations.
- 16 A distinction should however be made between the requirements of Community law applicable to Regulation No 3085/78, which involves amendment of the Staff Regulations, and those applicable to Regulation No 3086/78, which adjusts the weightings. A regulation such as Regulation No 3086/78, which determines the weightings, is adopted by the Council on a proposal from the Commission pursuant to Article 64 of the Staff Regulations, which imposes no obligation involving consultation.
- 17 As regards Regulation No 3085/78, it is true that Article 24 of the Merger Treaty provides for consultation with the other institutions concerned, one of those being the Parliament. That consultation, which in particular enables the Parliament effectively to participate in the Community's legislative process, is an essential feature of the institutional balance which the Treaties seek to achieve. Regular consultation with the Parliament constitutes therefore an essential procedural requirement, the disregard of which renders the

regulation in question void. It is therefore appropriate to consider whether the required consultation in fact took place.

- 18 On 1 April 1977 the Commission, after giving notice to the Staff Regulations Committee, placed before the Council a proposal for a Council regulation introducing the European unit of account (EUA) into the Staff Regulations (Official Journal 1977 C 99, p. 5). Article 1 concerns substitutions of the EUA for the Belgian franc in Article 63 of the Staff Regulations. The proposal incorporated the changes made necessary by the adoption of the EUA, in particular the substitution of a new table in Article 66 of the Staff Regulations, in which remuneration is expressed in European units of account in place of the old table in which remuneration is expressed in Belgian francs. Article 4 of the proposal concerns substitution of the following wording for Article 17 (4) of Annex VII to the Staff Regulations:

“Transfers provided for in paragraphs (2) and (3) shall be made on the basis of the value of the European unit of account (EUA) specified in the second paragraph of Article 63 of the Staff Regulations; the amounts transferred shall be weighted by a coefficient representing the ratio between the weighting for the country in the currency of which the transfer is made and the weighting for the country of the official’s employment.”

The proposal included other provisions which are not pertinent to this case.

- 19 Having received the proposal and a request for an opinion from the Council, the Parliament gave a favourable opinion (Official Journal 1977 C 183, p. 55). The Parliament’s resolution included, *inter alia*, the following recitals:

“Whereas the sole purpose of the Commission’s proposals submitted to Parliament is to express in European units of account those values (remunerations, allowances, transfers of funds, weightings, tax) hitherto expressed in Belgian francs, without affecting the rights of staff or exposing their emoluments to possible fluctuations;

.....

Whereas following the introduction of the European unit of account, weightings will no longer be required to correct exchange parities and will henceforth be used principally to take account of increases in the cost of living, as originally intended;

Whereas the Commission has given assurances that its proposals will in no way adversely affect the remunerations and other allowances of officials and other servants of the European Communities;”

- 20 The resolution asks the Commission to introduce, in good time, the administrative arrangements needed to ensure that the application of the European unit of account does not disrupt existing administrative practices or even temporarily harm the interests of the European Civil Service and notes the Commission’s assurance that its proposal will in no way affect the real value of the payments made to officials in the form of remuneration, pensions and allowances.
- 21 In a communication to the Council dated 29 November 1978 the Commission expressed the desire that Article 1 of its proposal of 1 April 1977 should be amended. The text of the new proposal corresponds to the first two paragraphs of Article 63 as amended by Regulation No 3085/78. In the same communication, the Commission proposed a transitional period of six months, that is to say until 1 October 1979, for pensioners and recipients of allowances whose net emoluments would suffer a reduction following the updating.
- 22 Regulation No 3085/78 followed that proposal from the Commission, adding, however, after the proposed transitional provision, a further transitional provision: “From that date the difference between the net amounts resulting from the implementation of this regulation and those received in September 1979 shall be reduced by $\frac{1}{10}$ per month”.

- 23 It appears from the report of the Parliament's Committee on Budgets that the Parliament was in a position to assess the possible impact of the Commission's initial proposal on pensions and transfers made under Article 17 of Annex VII to the Staff Regulations and that the assurances given to Parliament by the Commission must be understood to the effect that the "neutrality" of the proposal concerned the entire remuneration of officials and that in certain cases the Commission's proposal might have the effect of increasing the cost of transfers.
- 24 In fact, the regulation finally adopted conformed to the proposal submitted to the Parliament apart from the substitution of updated exchange rates for the EUA and the transitional provisions intended to alleviate the effect of the provisions of the regulation for a specific period with regard to certain pensioners. As regards the substitution of the updated exchange rates for the EUA, it should be noted that the rates adopted exactly reflected the value of the EUA in terms of national currencies as at 1 April 1978, so that that amendment to the initial proposal constituted in reality a change of method rather than of substance. As regards the transitional provision for the benefit of certain pensioners, it should be noted that that provision corresponded broadly to the wish expressed by the Parliament.
- 25 In those circumstances, further consultation with the Parliament regarding the contested provisions was unnecessary.
- 26 As regards the argument put forward by the applicant that the Economic and Social Committee and the Court of Auditors are institutions within the meaning of Article 24 of the Merger Treaty, and that consultation with them is an essential condition for the adoption of a regulation amending the Staff Regulations, it should be remembered that the Treaties establishing the Communities contain provisions specifying the institutions of the three Communities. The Economic and Social Committee and the Court of Auditors are not among those institutions. Accordingly, consultation with the Economic and Social Committee and the Court of Auditors was not mandatory.

- 27 It is true that, according to the second paragraph of Article 1 of the Staff Regulations, the Economic and Social Committee and the Court of Auditors are treated as Community institutions for the purposes of the Staff Regulations. That treatment, the object of which is to ensure that the Staff Regulations are applied to the officials and other servants of those two bodies and to identify the appointing authority for those employees, does not however extend to the application of the provisions of the Treaties, such as Article 24 of the Merger Treaty, relating to the adoption of Community regulations.

Content and effects of the regulations

- 28 The applicant is of the opinion that the new system for calculating the exchange rates for transfers encroaches upon his vested rights. On the basis of the provisions in force until April 1979 the applicant entered into binding commitments from which he could not be discharged for a specific period of time. The existence for many years of the facility for transferring regularly a certain part of his monthly remuneration induced him to enter into those commitments and he had every right to believe that the system would not be changed to his disadvantage before he was clear of his commitments, particularly with regard to loans. He is therefore entitled to the maintenance in force of the old transfer system, or at least to a transitional system continuing to apply the previous exchange rates until he is clear of his commitments. The Commission gave a formal undertaking to the Parliament to ensure that the measures to be adopted would be strictly "neutral" and would not affect the real value of the payments made to officials in the form of remuneration, pensions and allowances.
- 29 The applicant's arguments are based on the premise that he is entitled to have the exchange rate applied to transfers made pursuant to Article 17 of Annex VII to the Staff Regulations maintained at a level enabling him to receive, after making those transfers, a balance of remuneration in Italian lire equal to the amount he received in March 1979, at least until he is clear of the commitments he entered into before April 1979. It should, however, be noted that the exchange rates applied until April 1979 were particularly favourable to officials employed in countries with a weak currency. In fact, the weighting had been fixed so as to take into account the devaluation of the currency in the place of employment, and was applied to the remuneration in its entirety, whereas the transfers were made at the exchange rate for the year 1969. As from April 1979 remuneration was calculated on the basis of the updated exchange rates, so as to ensure that each official received the

same total remuneration, expressed in national currency, as he received in March 1979. Transfers continued to be made at an exchange rate more favourable than the official rate, although less favourable than the rate previously used, this being achieved by application to the amount transferred of the weighting derived from the relationship existing between the weighting fixed for the country in whose currency the transfer was made and the weighting fixed for the country in which the official was employed. This method of calculating the exchange rate was intended to enable an official employed in a country with a weak currency to make the transfers in question in respect of the same part of his total remuneration as an official employed in a country with a strong currency.

30 It is true that the application of the new provisions at issue entailed a decrease in the balance remaining for the applicant after making the same transfers as in March 1979. It should, however, be noted that that balance after the transfers are made has not been constant for many years, as is implied in the applicant's statements, but has varied according to adjustments of the weighting in line with changes in the cost of living and the rate of inflation.

31 It must be remembered that the weighting was introduced during a period of relative stability of currencies and that its function was to ensure that an official's remuneration was commensurate with the living conditions in the various places of employment. However, following the monetary crisis, the weighting was used not only to adapt remuneration to the living conditions in the various places of employment but also to provide compensation for the devaluation of certain weak currencies. Thus, in 1978, whilst the cost of living in Italy was lower than that in Belgium, the weighting for Italy was almost half as high again as that for Belgium. The application of that weighting to the exchange rates provided for the Staff Regulations in force until the end of 1978 (BFR 1 = LIT 12.50) compensated for the devaluation of the lira.

- 32 An inevitable result of that use of the weighting was that the weighting had to be applied to the portion of remuneration intended to be transferred pursuant to Article 17 of Annex VII to the Staff Regulations at the official rate since it formed part of the total remuneration. As a result, the more a weak currency was devalued, the greater was the decrease of the portion of the total remuneration required for the transfer of a specific amount to a country with a strong currency.
- 33 On the other hand, after the amendment to the Staff Regulations resulting from Regulation No 3085/78, it was possible to restore the proper function of the weighting, namely that of reflecting the living conditions in the various places of employment. Although the cost of the transfers was rendered less favourable, the system nevertheless continued to benefit officials employed in a country with a weak currency.
- 34 It appears therefore that even though there may be limits on the powers of the Community legislature to reduce the benefits enjoyed by officials under a system provided for in the Staff Regulations, the view that in this case those limits have not been observed cannot be upheld.
- 35 The applicant also criticizes the manner in which the weighting is calculated in Regulation No 3086/78. According to him, that calculation consists of an accounting device intended to leave things as they are, except with regard to the adverse effect on transfers, which constitutes a misuse of power.
- 36 In that respect, it should be noted that the adjustment of the exchange rates made by Regulation No 3085/78 removed the need for use of the weighting to compensate for the devaluation of certain currencies. Although as a result the weighting was fixed in such a manner as to give each official the total remuneration he would have received under the old system and although in certain cases that involved the loss of certain advantages regarding transfers, that consequence was in harmony with the purpose for which the Staff Regulations were amended and could not be described as a misuse of power.

- 37 As regards the statement of the reasons on which the regulations were based, which the applicant regards as insufficient, it is true that in the case of Regulation No 3085/78 it was succinct, but in view of the fluctuation of the various world currencies which occurred after adoption of the Staff Regulations, the recital expressing the need for adjustment of the exchange rates may be regarded as a sufficient statement of reasons. As regards Regulation No 3086/78, it is sufficient to note that it is, as stated in the recitals in the preamble thereto, the necessary consequence of Regulation No 3085/78 and accordingly the statement of reasons upon which it is based is sufficient.
- 38 Furthermore the applicant maintains that the absence in the contested regulations of transitional provisions in favour of serving officials similar to those of which pensioners have the benefit breaches the principle of non-discrimination.
- 39 In that respect, it is sufficient to point out that discrimination in the legal sense consists in treating in an identical manner situations which are different or treating in a different manner situations which are identical. The situation of a serving official differs considerably from that of a pensioner, so that there is no discrimination in a case where the Community legislature accords to pensioners treatment which is not identical to that applied to serving officials.
- 40 The same principle applies regarding the alleged discrimination arising from the fact that the Commission's decision to apply for a period of five years a special policy concerning the values to be taken into consideration regarding the cost of maintenance of persons treated as dependants (Administrative Notices No 233 of 30 April 1979). The matter of transfers may not be treated on the same footing as the case of the persons referred to by that decision.
- 41 The arguments based on the alleged discrimination must therefore be rejected.
- 42 Consideration of the submissions of the applicant having shown that none of the grounds relied upon may be upheld, the action must be dismissed as unfounded.

Costs

- 43 Under Article 69 (2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs.
- 44 Nevertheless, pursuant to Article 70 of the Rules of Procedure, the institutions are to bear the costs which they have incurred in proceedings commenced against them by officials of the Community.

On those grounds,

THE COURT (First Chamber)

hereby:

1. **Dismisses the application;**
2. **Orders the parties to bear their own costs.**

Bosco

O'Keeffe

Koopmans

Delivered in open court in Luxembourg on 4 February 1982.

J. A. Pompe
Deputy Registrar

G. Bosco
President of the First Chamber

OPINION OF MR ADVOCATE GENERAL CAPOTORTI

(see Case 167/80, [1981] ECR 1512)